IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

THE CHASE MANHATTAN BANK, As Collateral Agent,	:	
Plaintiff,	:	
v.	:	
IRIDIUM AFRICA CORPORATION; IRIDIUM CANADA, INC.; IRIDIUM CHINA (HONG KONG) LTD.; IRIDIUM INDIA TELECOM LTD.; IRIDIUM MIDDLE EAST CORPORATION; IRIDIUM SUDAMERICA CORPORATION; KHRUNICHEV STATE RESEARCH AND PRODUCTION SPACE CENTER; KOREA MOBILE TELECOMMUNICATIONS CORPORATION; LOCKHEED MARTIN CORPORATION; MOTOROLA, INC.; NIPPON IRIDIUM (BERMUDA) LTD.; PACIFIC ELECTRIC WIRE & CABLE CO., LTD.; RAYTHEON COMPANY; SPRINT IRIDIUM, INC.; STET-SOCIETÁ FINANZIARIA TELEFONICA PER AZIONI; THAI SATELLITE TELECOMMUNICATIONS CO., LTD.; and VEBACOM HOLDINGS, INC.,	:	Civil Action No: 00-564 JJF
Defendants.	:	

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MEMORANDUM OPINION

February 13, 2004

Wilmington, Delaware

Farnan, District Judge.

Presently before the Court are the Objections Of Defendants Korea Mobile Telecommunications Corporation, STET-Societa Finanziaria Telfonica Per Azioni, Iridium Africa Corporation, Iridium Middle East Corporation, Khrunichev State Research and Production Space Center, Iridium China (Hong Kong) Ltd., Motorola, Inc., Nippon Iridium (Bermuda) Ltd., Sprint Iridium, Inc., and Iridium Canada, Inc. (collectively the "Defendants") Pursuant To 28 U.S.C. § 363(B) To Memorandum And Order Of Magistrate Judge On Cross Motions For Summary Judgment (D.I. 663) and Defendant Sprint Iridium, Inc.'s ("Sprint Iridium") Objections To The Decision Of The Magistrate Judge Regarding Its Motion For Summary Judgment. (D.I. 664.) For the following reasons, the Court will overrule Defendants' Objections and Sprint Iridium's Objections.

BACKGROUND

The dispute in this case arises from an $800 million loan (the "Chase Loan") the Chase Manhattan Bank ("Chase") extended to Iridium LLC in 1998. As security for this loan, Iridium LLC and its Members purportedly pledged the Members' Reserve Capital Call ("RCC") obligations to Chase. Iridium LLC and its Members effectuated this pledge through amendments to the LLC Agreement and various other agreements. Upon Iridium LLC's default on the Chase Loan, Chase unsuccessfully attempted to call the Members'

RCC obligations and commenced the instant action. The Magistrate Judge, in an April 23, 2002, Report and Recommendation (D.I. 648), recommended the denial and granting of various sections of the parties' summary judgment motions. The parties' objections to the Magistrate Judge's report and recommendation are now before the Court. The Court will discuss Defendants' and Sprint Iridium's Objections separately.

STANDARDS OF REVIEW

I. Review Of A Magistrate Judge's Report & Recommendation

When reviewing a dispositive matter decided by a magistrate judge, a district court shall conduct a de novo determination of those portions of the magistrate judge's report and recommendation to which a party objects. See 28 U.S.C. § 636(b)(1)(B). A summary judgment motion is a dispositive matter for the purposes of Section 636. See id. Under Section 636(b)(1)(B), a district court "may accept, reject, or modify, in whole or in part [the magistrate judge's] findings and recommendations, and may also receive further evidence." Haines v. Liggett Group Inc., 975 F.2d 81, 91 (3d Cir. 1992)(inner quotation omitted).

II. Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides that a party is entitled to summary judgment if a court determines from its examination of "the pleadings, depositions,

answers to interrogatories, and admissions on file, together with the affidavits, if any," that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In determining whether there is a triable dispute of material fact, a court must review all of the evidence and construe all inferences in the light most favorable to the non-moving party. Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976). However, a court should not make credibility determinations or weigh the evidence. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000). Thus, to properly consider all of the evidence without making credibility determinations or weighing the evidence the "court should give credence to the evidence favoring the [non-movant] as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.'" Id. (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986)).

To defeat a motion for summary judgment, Rule 56(c) requires the non-moving party to:

> do more than simply show that there is some metaphysical doubt as to the material facts. . . . In the language of the Rule, the non-moving party must come forward with "specific facts showing that there is a genuine issue for trial." . . . Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is "no genuine issue for trial."

Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986)(quoting Fed. R. Civ. P. 56). Accordingly, a mere scintilla of evidence in support of the non-moving party is insufficient for a court to deny summary judgment. Liberty Lobby, Inc., 477 U.S. at 252 (1986).

DISCUSSION

I. Objections Of Defendants Pursuant To 28 U.S.C. § 363(B) To Memorandum And Order Of Magistrate Judge On Cross Motions For Summary Judgment (D.I. 663)

A. Whether Section 11.01(e) Of The LLC Agreement Permits The Members To "Consent" In Ways Other Than By A Writing

In her Report and Recommendation, the Magistrate Judge denied the Defendants' summary judgment motion in part because she found that the Members who were absent from the 1997 Meeting may have given their "consent" to the amendment of the LLC Agreement through acts other than written consent, thus presenting a genuine issue of disputed material fact inappropriate for resolution by a summary judgment motion. (D.I. 648 at 10.)[1] Defendants object to the Magistrate Judge's conclusion, contending that as a matter of contract and Delaware law the Members' consent can be manifested only through an affirmative vote at a meeting or by written consent. (D.I. 663.)

[1] During a 1997 meeting attended by Iridium LLC's Board of Directors and various Members, the attendees purportedly amended Section 4.02 of the LLC Agreement. Section 11.01(e) of the LLC Agreement requires that in order to amend Section 4.02, the Members must unanimously "consent" to such amendment.

In response, Chase contends that Section 11.01(e) of the LLC Agreement does not limit the Members' consent to these two methods. (D.I. 675.) For the following reasons, the Court will adopt the Magistrate Judge's Report and Recommendation on this issue.

As an initial matter, the Court notes its disagreement with the Defendants' contention that Delaware law provides that the Members could consent only by an affirmative vote at a meeting or by written consent. The Delaware LLC Act (the "LLC Act"), 6 Del. C. § 18-302, provides that members of an LLC may take action without a meeting if they do so with written consent. 6 Del. C. § 18-302(d). However, this provision of the LLC Act does not prevail over inconsistent procedures in an LLC Agreement. Id. (stating that the provisions of this section will not apply if the LLC Agreement provides otherwise). The LLC Agreement in this case appears to provide for alternative methods of consent. Section 2.03(l) of the LLC Agreement mirrors Section 18-302(d) of the LLC Act and states that Members may take action without a meeting if they do so with written consent. However, Section 11.01(e) of the LLC Agreement, the provision at issue, does not limit the Members' expression of their consent to an amendment by written consent or affirmative vote. Accordingly, the Court concludes that the Members could consent to an amendment of the LLC Agreement in a manner other than affirmative vote at a

meeting or by written consent. Therefore, the Court will adopt the Magistrate Judge's Report and Recommendation that the manner in which the Members could deliver their consent and whether those requirements were met are factual questions inappropriate for resolution at this stage of the proceedings. See In re Stendaro, 991 F.2d 1089, 1094 (3d Cir. 1993)(stating that the interpretation of an ambiguous contract term is a question of fact for the jury).

B. Whether Acquiescence, Estoppel, and Ratification Prevail Over Defendants' Lack Of Consent Defense

The Magistrate Judge concluded that the doctrines of ratification and estoppel may be applicable to negate Defendants' lack of consent defense. (D.I. 648 at 14.) However, the Magistrate Judge did not grant Chase summary judgment as she found that genuine issues of material fact remained. Id. Defendants object to the Magistrate Judge's Report and Recommendation, contending that the LLC Agreement and the LLC Act preclude the application of these doctrines. Defendants contend that because the Members could consent to the amendment only through an affirmative vote at a meeting or through written consent, the equitable doctrines cannot apply.

As noted above, the Court concludes that the Members could consent to an amendment of the LLC Agreement through methods other than by affirmative vote at a meeting or by written consent. Accordingly, the Court is not persuaded by the

Defendants' objection and adopts the Magistrate Judge's Report and Recommendation on this issue.

C. Whether Section 365(c)(2) of the Bankruptcy Code Prevents Chase From Calling The Members' RCC Obligations

The Magistrate Judge concluded that Section 365(c)(2) of the Bankruptcy Code precludes Chase from calling the Members' RCC obligations. (D.I. 648 at 17-23.) However, the Magistrate Judge did not grant Defendants summary judgment because the Magistrate Judge found that questions of material fact existed as to whether the LLC Agreement remained executory following Iridium LLC's bankruptcy. Id. at 22. Defendants object to this section of the Report and Recommendation, contending, as a matter of law, that the LLC Agreement is an executory contract. Further, the Defendants contend that the Magistrate Judge failed to consider the LLC Agreement as a whole when evaluating its executory nature. In response, Chase contends that Section 365(c)(2) of the Bankruptcy Code does not bar its enforcement of the RCC obligations because Delaware law provides that it may enforce the obligations notwithstanding Iridium LLC's bankruptcy. Further, Chase contends that the Class 1 interests Iridium LLC provides to the Members in exchange for the Members' payment of their RCC obligations are not within the financing activities prohibited by Section 365(c)(2) of the Bankruptcy Code.

The Court notes that it previously issued a Memorandum Order

resolving identical issues on September 30, 2003. See The Chase Manhattan Bank v. Iridium Italia, S.p.A., Pacific Asia Communications, Ltd., and Pacific Iridium Holdings, Inc., C.A. No. 02-1368 JJF (D.I. 101.) Although the motion before the Court in that action was a motion to dismiss, the Court concludes that its rationale is equally applicable to the instant Objections.

Turning to the merits of the Objections, the Court is not persuaded by Chase's argument that Section 365 of the Bankruptcy Code is inapplicable because the present action is not a bankruptcy case. Chase contends that Iridium LLC and the Members pledged Chase their RCC obligations. Therefore, Chase is either a third-party beneficiary or assignee of the RCC obligations. It follows that if Iridium LLC, as a principal to the LLC Agreement, is unable to enforce the RCC, Chase should also be unsuccessful. See 13 Williston on Contracts § 37:23 (4th ed. 2003)(stating that a beneficiary is subject to rules governing the original party to a contract); United Steelworkers of America v. Rawson, 495 U.S. 362 (1990)(noting that under general contract principles a third party has no greater rights under a contract that the principals).

Further, the Court disagrees with Chase's contention that the Defendants can waive or that the Delaware LLC Act can prevail over Section 365 of the Bankruptcy Code. It is clear that parties cannot waive the protective provisions of Section 365(c)

of the Bankruptcy Code through private agreement. In re Cardinal Inds., Inc., 146 B.R. 720 (Bankr. S.D. Ohio 1992); In re Sun Runner Marine, 945 F.2d 1089, 1094 (9th Cir. 1991)(noting that the contracts prohibited by Section 365 of the Bankruptcy Code may have serious affects on other third-party creditors and thus prevent contractual waiver). Section 365 of the Bankruptcy Code is intended to protect all creditors of the debtor and a contract with one or a few creditors cannot waive the Bankruptcy Code's protections. Id. Chase's argument that the Delaware LLC Act can prevail over Section 365 of the Bankruptcy Code is also unavailing because the Bankruptcy Code supercedes inconsistent state law. See Matter of Quanta Res. Corp., 739 F.2d 912, 917 (3d Cir. 1984). Accordingly, the remaining issue is whether Section 365(c)(2) of the Bankruptcy Code would prohibit Iridium LLC's assumption of the RCC obligations.

Section 365(c)(2) of the Bankruptcy Code prohibits a debtor or trustee from assuming an executory contract if "such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor." 11 U.S.C. § 365(c)(2). However, Section 365(c)(2) of the Bankruptcy Code "permits the trustee to continue to use and pay for property already advanced." See In re East Tex. Steel Facilities, Inc., 117 B.R. 235, 242 (Bankr. N.D. Tex. 1990)(quoting H.R.Rep. No. 95-595,

95th Cong., 1st Sess. 348 (1977)). Moreover, "[t]he purpose of this subsection is to make it clear that a party to a transaction which is based upon the financial strength of a debtor should not be required to extend new credit to the debtor." S. REP. 95-989, 95th Cong., 2d Sess. 58-59 (1978) (emphasis added). Courts, therefore, are to "strictly construe the terms 'loan,' 'debt financing' and 'financial accommodation' narrowly." In re Emerald Forest Constr., 226 B.R. 659, 664 (Bankr. D. Mont. 1998). To determine whether Chase's calling of the Members' RCC obligations is prohibited by Section 365 of the Bankruptcy Code, the Court must determine whether the RCC was "already advanced property" or an extension of a new loan, debt financing, financial accommodation, or issuance of a security to a debtor in bankruptcy.

The Court concludes that the RCC does not run afoul of § 365(c)(2) of the Bankruptcy Code. The purpose of Section 365(c)(2) of the Bankruptcy Code is to protect parties from financial exposure for new obligations whose repayment relies on the fiscal strength of the already bankrupt debtor. However, the Defendants' obligations under the RCC were not new obligations. While it is correct that in order to effectuate the performance of the RCC the Defendants would purchase a certain number of Class 1 Interests, these purchases are, for all practical purposes, existing debt obligations. Section 4.02 of the LLC

Agreement states that "[e]ach Member . . . hereby irrevocably and unconditionally agrees to purchase additional Class 1 Interests . . . if an Event of Default . . . exists under a Loan Agreement [which the RCC guarantees]." § 4.02 of LLC Agreement. In November of 1998, the Members passed a resolution purportedly authorizing Iridium LLC to use their RCC obligations as security for Chase's 1998 Loan.[2] This long-existing pledge to purchase Class 1 interests, therefore, qualifies as an "already advanced" guarantee that the trustee or debtor is permitted to continue to use. See H.R.Rep. No. 95-595, 95th Cong., 1st Sess. 348 (1977). The Court is not persuaded, as argued by Defendants, that simply because calling on the RCC obligations entails an exchange of money for securities, that it is proscribed by Section 365 of the Bankruptcy Code. Section 4.02 of the LLC Agreement does not foresee a transaction where the Members would be extending the debtor new capital in exchange for worthless debt. See In re Securities Group 1980 v. Dayton Securities Ass'n, 124 B.R. 875 (Bankr. M.D. Fla. 1991)(noting that capital call contributions are not the equivalent of an extension of new credit). Instead, the commitment is more analogous to an old "equity investment" that the Members already made. Id. In these circumstances, the

[2] The Court, at this point, is not commenting on the validity of the disputed amendments to the LLC Agreement which would permit Chase to directly call on the Members to perform on the RCC.

Court concludes that the Defendants are not within the class of creditors Congress intended to protect under Section 365(c)(2) of the Bankruptcy Code.

II. Sprint Iridium's Objections To The Decision Of The Magistrate Judge Regarding Its Motion For Summary Judgment (D.I. 664)

The Magistrate Judge concluded that she could not grant Sprint Iridium summary judgment because genuine issues of material fact remained regarding its impracticability defense. (D.I. 648 at 22 n. 16.) In its Objections to the Magistrate Judge's Report and Recommendation, Sprint Iridium contends that the Magistrate Judge did not actually address its impracticability defense. Sprint Iridium contends that its defense precludes Chase from calling the Members' RCC obligations because Iridium LLC is bankrupt, and therefore, the doctrine of impracticability relieves the Members of their RCC obligations. In response, Chase indicates that it agrees with the Magistrate Judge's Report and Recommendation on this issue.

Delaware courts have not explicitly recognized the doctrine of commercial impracticability. J&G Assoc. v. Ritz Camera Ctrs., Inc., 1989 WL 115216 (Del. Ch. 1989). However, at least one Delaware court stated that Delaware law does not preclude the availability of the doctrine with regard to commercial relations. Id. at *3-4; see also Freidco of Wilmington, Delaware, Ltd. v. Farmers Bank of State of Delaware, 529 F.Supp. 822, 825 (D. Del.

1981). Discharge of a contract by reason of impracticability requires proof of three elements: "[1)] a party's performance is made impracticable without his fault[; 2)] by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made[; 3)]his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary." Restatement (Second) of Contracts § 261 (1981). Applying these elements to the facts in this case, the Court will adopt the Magistrate Judge's Report and Recommendation on this issue.

Sprint Iridium has not provided the Court with proof of two of the three elements of commercial impracticability. First, as Chase contends, Sprint Iridium has not proffered any evidence that Iridium LLC's default on the Chase Loan was not attributable, at least in part, to Sprint Iridium's actions. Further, Sprint Iridium has offered no proof demonstrating that Iridium LLC's bankruptcy was an event the "non-occurrence of which was a basic assumption on which the contract was made." Id. It is difficult to conceive of a sophisticated lender that would not foresee a borrower's bankruptcy as a potential event leading to the borrower's default on its loan. In sum, because of Sprint Iridium's failure to establish two of the three elements of commercial impracticability, the Court will deny Sprint Iridium's Motion.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

THE CHASE MANHATTAN BANK, As Collateral Agent,	:	
Plaintiff,	:	
v.	:	
IRIDIUM AFRICA CORPORATION; IRIDIUM CANADA, INC.; IRIDIUM CHINA (HONG KONG) LTD.; IRIDIUM INDIA TELECOM LTD.; IRIDIUM MIDDLE EAST CORPORATION; IRIDIUM SUDAMERICA CORPORATION; KHRUNICHEV STATE RESEARCH AND PRODUCTION SPACE CENTER; KOREA MOBILE TELECOMMUNICATIONS CORPORATION; LOCKHEED MARTIN CORPORATION; MOTOROLA, INC.; NIPPON IRIDIUM (BERMUDA) LTD.; PACIFIC ELECTRIC WIRE & CABLE CO., LTD.; RAYTHEON COMPANY; SPRINT IRIDIUM, INC.; STET-SOCIETÁ FINANZIARIA TELEFONICA PER AZIONI; THAI SATELLITE TELECOMMUNICATIONS CO., LTD.; and VEBACOM HOLDINGS, INC.,	:	Civil Action No: 00-564 JJF
Defendants.	:	

ORDER

At Wilmington, this 13th day of February, 2004, for the reasons discussed in the Memorandum Opinion issued this date;

NOW THEREFORE, IT IS HEREBY ORDERED that:

1) Defendants Korea Mobile Telecommunications Corporation, STET-Societa Finanziaria Telfonica Per Azioni, Iridium Africa Corporation, Iridium Middle East Corporation, Khrunichev State Research and Production Space Center, Iridium China (Hong Kong) Ltd., Motorola, Inc., Nippon Iridium (Bermuda) Ltd., Sprint Iridium, Inc., and Iridium Canada, Inc. (collectively the "Defendants") Objections Pursuant To 28 U.S.C. § 363(B) To Memorandum

And Order Of Magistrate Judge On Cross Motions For Summary Judgment (D.I. 663) are **OVERRULED**;

2) The Court will **ADOPT** the Report and Recommendation (D.I. 648) on the issues of:

   A) Whether Section 11.01(e) of the LLC Agreement permits the Members to consent in ways other than by a writing;

   B) Whether acquiescence, estoppel, and ratification prevail over the Defendants' lack of consent defense;

3) The Court will **NOT ADOPT** the Report and Recommendation (D.I. 648) on the issue of the preclusive effect of Section 365(c)(2) of the Bankruptcy Code;

4) Sprint Iridium, Inc.'s Objections To The Decision Of The Magistrate Judge Regarding Its Motion For Summary Judgment (D.I. 664) are **OVERRULED** and the Report and Recommendation regarding its Motion For Summary Judgment (D.I. 546) is **ADOPTED**.

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE